

1 COOLEY LLP
MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
2 101 California Street, 5th Floor
San Francisco, CA 94111-5800
3 Telephone: (415) 693-2000
Facsimile: (415) 693-2222
4

COOLEY LLP
5 MAZDA K. ANTIA (214963) (mantia@cooley.com)
4401 Eastgate Mall
6 San Diego, CA 92121-1909
Telephone: (858) 550-6000
7 Facsimile: (858) 550-6420

8 Attorneys for KIK INTERACTIVE, INC.

9 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 MARC OPPERMAN, *et al.*,
12 Plaintiffs,
13 v.
14 PATH, INC., *et al.*,
15 Defendants.

Case No. 13-cv-00453-JST

CLASS ACTION

**KIK INTERACTIVE, INC.’S MOTION TO
DISMISS PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(2)**

**THIS DOCUMENT RELATES ONLY TO:
OPPERMAN, ET AL. V. PATH, INC., ET AL.,
No. 13-cv-00453-JST**

DATE: November 13, 2013
TIME: 9:30 a.m.
COURTROOM: 9
JUDGE: Hon. Jon S. Tigar

19 OSCAR HERNANDEZ, *et al.*,
20 Plaintiffs,
21 v.
22 PATH, INC.,
23 Defendant.

Case No. 12-cv-01515-JST

CLASS ACTION

24 MARIA PIROZZI,
25 Plaintiff,
26 v.
27 APPLE INC.,
28 Defendant.

Case No. 12-cv-01529-JST

CLASS ACTION

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 13, 2013 at 9:30 a.m., or as soon thereafter as this motion may be heard in the above-referenced court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Courtroom 9, 19th Floor, Kik Interactive, Inc. (“Kik”) will and hereby does move to dismiss the Consolidated Amended Class Action Complaint (“Complaint” or “CAC” (Dkt. No. 362)). This motion is made under Federal Rule of Civil Procedure 12(b)(2) and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Peter Heinke, pleadings on file, oral argument of counsel, and such other materials and argument as may be presented and appropriately considered in connection with this motion.

STATEMENT OF RELIEF SOUGHT

Kik seeks an order dismissing with prejudice Plaintiffs’ CAC and each of the claims alleged therein for lack of personal jurisdiction.

STATEMENT OF ISSUE TO BE DECIDED

Whether Kik has sufficient contacts with California or the United States to support the exercise of personal jurisdiction in this forum, and whether doing so would be reasonable and consistent with Kik’s right to due process.

1 **I. INTRODUCTION**

2 Kik moves to dismiss the CAC for lack of personal jurisdiction pursuant to Federal Rule
3 of Civil Procedure 12(b)(2). Kik has insufficient contacts with California or the United States to
4 subject it to personal jurisdiction, and the exercise of personal jurisdiction over Kik in this forum
5 would be constitutionally unreasonable.

6 This is a putative class action in which two plaintiffs residing in Virginia and Arkansas
7 allegedly downloaded and installed a free mobile-messaging application (“app”) developed by a
8 foreign corporation with its headquarters, principal place of business, and sole office located in
9 Ontario, Canada. Neither of these plaintiffs downloaded or used the app in California, nor do
10 they allege that they suffered any harm in California. Kik has no bank accounts, employees, or
11 property in California, does not direct advertising toward consumers in California, does not derive
12 any revenue from the downloading or installation of its app from any consumers in California,
13 and pays no taxes in California.

14 Despite these undisputed facts, Plaintiffs assert that Kik is subject to personal jurisdiction
15 in this forum based solely on Kik’s contractual relationship with California-based Apple, Inc.
16 That contract, a standard-form click-through agreement that Kik executed electronically from
17 Canada, allows Kik to distribute its free app to iDevice users *worldwide* via Apple’s iTunes or
18 App Store programs. Neither Kik’s contract with Apple, nor the fact that Kik’s app has been
19 downloaded by millions of users worldwide, provide a sufficient basis to exercise personal
20 jurisdiction over Kik in this forum.

21 This Court would not be the first to conclude that Kik’s electronic distribution of its free
22 app around the globe was insufficient to support the exercise of personal jurisdiction. The
23 Eastern District of Virginia recently considered and rejected jurisdictional arguments very similar
24 to those asserted by Plaintiffs in this case. *See Intercarrier Commc’ns, LLC v. Kik Interactive,*
25 *Inc.*, No. 12-cv-00771-JAG, 2013 WL 4061259 (E.D. Va. Aug. 9, 2013). In that case, the court
26 relied on many of the same facts relevant to this motion in concluding that the worldwide
27 electronic availability of Kik’s app via Apple’s App Store did not support the exercise of general
28 or specific personal jurisdiction: “A company does not ‘consciously’ or ‘deliberately’ target a

1 forum if a user unilaterally downloads and uses its software within that forum.” *Id.* at *4. Here
2 too, Plaintiffs’ jurisdictional arguments are based on “flawed logic” that assumes Kik has
3 established minimum contacts with the forum “simply because [its] product is popular and
4 widely-used.” *Id.*

5 In sum, Plaintiffs have not made even a prima facie showing that Kik has sufficient
6 contacts with California or the United States to support the exercise of personal jurisdiction over
7 Kik. Consequently, Kik respectfully requests that the Court dismiss Plaintiffs’ claims against Kik
8 in the CAC pursuant to Rule 12(b)(2).

9 **II. STATEMENT OF FACTS**

10 Kik is a Canadian start-up company that developed and offers for download a popular and
11 free instant-messaging application for smart phones called Kik Messenger (the “App”). The App
12 was developed in Canada, where Kik is headquartered and has its sole office and principal place
13 of business. (CAC ¶ 42; *see also* Declaration of Peter Heinke (“Heinke Decl.,” filed herewith),
14 ¶¶ 3–4.) Kik’s headquarters in Waterloo, Ontario, is also where its corporate policies, such as its
15 privacy policy and other policies related to users and user data, are set. (Heinke Decl., ¶ 5.) All
16 of Kik’s approximately 35 employees are located in Ontario, Canada. (*Id.* at ¶ 6.)

17 Kik does not have bank accounts, pay taxes, own any property, or have an agent for
18 service of process in California or the United States. (*Id.* at ¶¶ 8–10.) Kik has no relevant
19 documents located in California and no Kik witnesses with knowledge of Plaintiffs’ allegations
20 regarding the operation and implementation of the App are located in California. (*Id.* at ¶ 17.)

21 Kik does not conduct any advertising directed specifically toward California or the United
22 States, does not derive any revenue from the downloading or installation of Kik Messenger from
23 any consumers in California or the United States, and does not specifically target any consumers
24 in California or the United States. (*Id.* at ¶¶ 11–12.) Rather than directly marketing or offering
25 its App to consumers, Kik allows Kik Messenger to be downloaded *for free* from Apple’s App
26 Store. (*Id.* at ¶ 13.)

27 Apple’s App Store is available to consumers around the world and allows those
28 consumers to, among other things, view, download, and/or purchase a large variety of apps

1 including Kik Messenger. Kik does not require its users to provide their full names, addresses,
 2 telephone numbers, or any other geographic or demographic data during download, installation,
 3 or use of the App. (*Id.* at ¶ 16.) Accordingly, Kik has no reliable or accurate means of
 4 determining how many California residents downloaded Kik Messenger during the time period
 5 relevant to Plaintiffs’ CAC.¹ (*Id.*)

6 In the CAC, the *Opperman* Plaintiffs assert claims against on behalf of a putative class of
 7 persons who downloaded Kik Messenger on their Apple-produced iDevices between July 10,
 8 2008 to the present. (CAC, ¶ 48.) Two of the named plaintiffs, Stephanie Dennis-Cooley and
 9 Jason Green, allegedly downloaded and installed Kik Messenger at some point prior to February
 10 2012. (*Id.* at ¶¶ 21, 22.)

11 Plaintiffs’ assert that their “claims against Kik Interactive arise, in whole or in part, out of
 12 the business Kik Interactive conducted in California.” (*Id.* at ¶ 42.²) Plaintiffs do not, however,
 13 assert that either of the two named plaintiffs who allegedly downloaded Kik Messenger are
 14 residents of California. Those plaintiffs, Stephanie Dennis-Cooley and Jason Green, allegedly
 15 downloaded the App in Virginia and Arkansas, respectively. (*Id.* at ¶¶ 21, 22.)

16 Plaintiffs further allege that Kik—like each of the non-Apple defendants—“regularly
 17 conducts business in this judicial district” and “appoint[ed] Apple as [its] agent to market and
 18 deploy [its app] to Plaintiffs’ iDevices.” (*Id.* at ¶ 14.) With respect to Kik specifically, Plaintiffs
 19 allege that:

20 Kik Interactive has done substantial business in California with Apple since 2010
 21 and with Plaintiffs directly related to the Kik Messenger iDevice app at issue in
 22 this case. For instance, Kik Interactive appointed Apple as its agent on the *Kik
 Messenger* iDevice App. Apple, operating from California and in furtherance of
 its role as Kik Interactive’s agent, marketed the *Kik Messenger* iDevice app to

23 ¹ Pursuant to the Court’s instructions during the August 1st case-management conference (*see*
 24 Transcript of Proceedings (Aug. 1, 2013) at 35:20–36:1), Kik requested in writing on August 21st
 25 that Plaintiffs provide the emails and user IDs for the two named plaintiffs who allegedly
 downloaded Kik Messenger. To date, Kik has received no response from Plaintiffs. Kik thus
 cannot confirm whether or when the named plaintiffs downloaded the App.

26 ² Plaintiffs added these California-specific jurisdictional allegations in the CAC despite their
 27 counsel’s representations to the Court during the August 1st case-management conference that the
 CAC would assert no new or additional jurisdictional facts relevant to Kik’s motion to dismiss.
 28 (*See* Transcript of Proceedings (Aug. 1, 2013) at 37:24–38:4, 38:24–39:12.)

1 Plaintiffs and deployed the *Kik Messenger* app on the designated Plaintiffs’
2 iDevices.

3 (*Id.* at ¶ 42.)

4 Finally, Plaintiffs allege that the Western District of Texas “previously determined in its
5 transfer order (ECF No. 217) that all Defendants are subject to personal jurisdiction in the
6 Northern District of California.” (*Id.* at ¶ 14.)

7 **III. APPLICABLE LEGAL STANDARDS**

8 A court may exercise personal jurisdiction over a non-resident defendant if: (1) the
9 defendant has a continuous and systematic presence in the state (*general* jurisdiction); or (2) the
10 defendant has “minimum contacts” with the forum state such that the exercise of jurisdiction
11 “does not offend traditional notions of fair play and substantial justice” (*specific* jurisdiction).
12 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (quoting *Int’l Shoe Co. v.*
13 *Washington*, 326 U.S. 310, 315 (1945)).

14 In the Ninth Circuit, courts undertake a three-part inquiry to determine whether the non-
15 resident defendant has sufficient minimum contacts with the forum to justify the exercise of
16 personal jurisdiction.³ *First*, the plaintiff must make a prima facie showing that the defendant
17 (a) purposefully availed itself of the privilege of conducting activities in the forum, or
18 (b) purposefully directed its activities toward the forum. *Second*, the plaintiff’s claims must arise
19 out of or result from the defendant’s forum-related activities. *Third*, the exercise of personal

20
21 ³ Due process also requires that the forum court “examine the defendant’s contacts with the
22 forum *at the time of the events underlying the dispute* when determining whether they have
23 jurisdiction.” *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) (emphasis added)
24 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984)).
25 Accordingly, Kik’s contacts with California are relevant to the personal-jurisdiction inquiry only
26 to the extent those contacts existed at the time that the named plaintiffs allegedly downloaded Kik
27 Messenger—*i.e.*, at some point prior to February 2012. *See id.* (“[T]he fair warning that due
28 process requires arises not at the time of the suit, but when the events that gave rise to the suit
occurred.”); *see also Berdux v. Project Time & Cost, Inc.*, 669 F. Supp. 2d 1094, 1099–1100
(N.D. Cal. 2009) (“When a court assesses minimal contacts for the purpose to asserting specific
jurisdiction, ‘only contacts occurring prior to the event causing the litigation may be
considered.’”) (emphasis added) (quoting *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*,
907 F.2d 911, 913 (9th Cir. 1990)).

1 jurisdiction over the defendant must be “reasonable”—*i.e.*, consistent with the non-resident
2 defendant’s right to due process. *Pebble Beach Co.*, 453 F.3d at 1155.

3 The plaintiff bears the burden of proving the first two conditions. *See id.* If the plaintiff
4 carries this burden, the defendant must make a compelling showing that the exercise of
5 jurisdiction would be unreasonable. *See Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir.
6 2008).

7 If the plaintiff asserts that the defendant is subject to personal jurisdiction under a state’s
8 long-arm statute, a district court should apply the law of the state where the court sits.
9 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Here, California’s
10 long-arm statute requires only that the exercise of personal jurisdiction comply with federal due
11 process requirements. *Id.* at 800–01.

12 If the plaintiff asserts jurisdiction under Federal Rule of Civil Procedure 4(k)(2),
13 commonly referred to as the “federal long-arm statute,” the court must find that (1) the plaintiff’s
14 claim against the defendant arises under federal law, (2) the defendant is *not* subject to the
15 personal jurisdiction of any state court of general jurisdiction, and (3) the court’s exercise of
16 personal jurisdiction comports with due process. *Pebble Beach Co.*, 453 F.3d at 1159.

17 In the context of a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2),
18 the plaintiff’s version of the facts is taken as true. *See Panthera Railcar LLC v. Kasgro Rail*
19 *Corp.*, No. 12-cv-06458-SI, 2013 WL 1996318, at *3 (N.D. Cal. May 13, 2013).

20 **IV. ARGUMENT**

21 **A. Kik Is Not Subject to General Personal Jurisdiction in California.**

22 To the extent that Plaintiffs assert that Kik is subject to general personal jurisdiction in
23 California,⁴ the allegations in the CAC fail to make the required prima facie showing. Kik’s
24 alleged contacts with California are not nearly “so continuous and systematic as to render [Kik]
25 essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131
26 S. Ct. 2846, 2851 (2011) (internal quotations omitted). Kik maintains no offices and has no

27 _____
28 ⁴ In their opposition to Kik’s previous Rule 12(b)(2) motion, Plaintiffs asserted that Kik was
subject to general personal jurisdiction in *Texas*. (*See* Dkt. No. 203 (“Pltfs.’ Opp’n”) at 7–8.)

1 employees, properties, or bank accounts in California; engages in no advertising directed at
 2 California consumers; and derives no revenue from consumers in California from the download
 3 or installation of its App. (Heinke Decl., ¶¶ 3, 6, 8, 11, 12.)

4 As a foreign non-resident defendant, even if Kik conducted “continuous activity of some
 5 sorts within [California],” this would not be enough “to support the demand that the corporation
 6 be amenable to suits unrelated to that activity.” *Goodyear*, 131 S. Ct. at 2856 (internal quotations
 7 omitted). Although Plaintiffs make much of Kik’s contractual relationship with Apple—asserting
 8 that Kik “has done substantial business in California with Apple since 2010,” (CAC, ¶ 42)—
 9 neither that relationship nor the worldwide availability of Kik Messenger via Apple’s App Store
 10 (and the internet) are contacts with California “of the sort that approximate physical presence.”
 11 *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *see also*
 12 *Helicopteros*, 466 U.S. at 418 (no general jurisdiction over company that purchased 80% of its
 13 helicopters, spare parts, and accessories from Texas).

14 **B. Kik Is Not Subject to *Specific Personal Jurisdiction* in California.**

15 Plaintiffs also fail to make a prima facie showing that Kik is subject to specific personal
 16 jurisdiction in California. To do so, Plaintiffs would have to show that Kik (1) “has performed
 17 some act or consummated some transaction within the forum or otherwise purposely availed
 18 [it]self of the privileges of conducting activities in the forum, (2) the claim arises out of or results
 19 from the defendant’s forum-related activities, and (3) the exercise of jurisdiction is reasonable.”
 20 *Bancroft*, 223 F.3d at 1086.

21 In fact, as Plaintiffs previously conceded, the uncontested evidence shows that Kik is *not*
 22 subject to personal jurisdiction in this district:

23 [M]ovants fail to provide evidence to show that even they would all be properly
 24 subject to jurisdiction in California’s Northern District. To the contrary,
 25 declarations from Chillingo and *Kik* instead show them to be *international*
corporations and *do not state any jurisdictional California contacts*.

26 (Pltfs.’ Response to Certain Defs.’ Motion to Transfer under 28 U.S.C. § 1404(a) (Dkt. No. 193)
 27 at 3 (“Pltfs.’ Opp’n to Transfer”) (emphasis added).) Even if Plaintiffs had not conceded the
 28 point, Kik’s relevant contacts with California would not support a conclusion that Kik’s “conduct

1 and connection with the forum State [is] such that [it] should reasonably anticipate being haled
2 into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

3 **1. Kik has not performed some act or consummated a transaction in**
4 **California sufficient to support personal jurisdiction.**

5 Plaintiffs’ jurisdictional theory rests entirely on a click-through agreement entered into
6 between Kik and Apple known as the iPhone Developer Program License Agreement (“IDPLA”).
7 (CAC, ¶¶ 186–87.) This contract, however, was not negotiated between the parties, nor was it
8 executed by either party in California—Kik executed it electronically from its headquarters in
9 Ontario, Canada (Heinke Decl., ¶¶ 14–15), and Plaintiffs previously asserted that Kik’s
10 counterparty to the IDPLA was “Apple’s *Austin, Texas* licensing office” (Pltfs.’ Opp’n, at 1
11 (emphasis added)).

12 Plaintiffs describe Kik’s relationship with Apple in the broadest possible terms by alleging
13 that Kik “appointed Apple as its agent on the *Kik Messenger* iDevice App” and authorizing Apple
14 to “market[] the *Kik Messenger* iDevice app to Plaintiffs and deploy[] the *Kik Messenger* app on
15 the designated Plaintiffs’ iDevices.” (CAC, ¶ 42.) Regardless how Plaintiffs characterize the
16 terms of the IDPLA, the agreement is simply a take-it-or-leave-it contract.⁵ The purpose of the
17 contract is to enable Kik to distribute its App electronically to iDevice users worldwide (*see*
18 CAC, ¶ 186); the fact that Apple happens to be based in California does not provide a basis to
19 assert personal jurisdiction over Kik in this case. *See Berdux*, 669 F. Supp. 2d at 1101 (“That a
20 forum resident be a party to the contract is neither a necessary nor a sufficient condition for
21 establishing jurisdiction.”).

22 Plaintiffs’ position appears to be that Kik, like the hundreds of thousands of other app
23 developers worldwide whose apps are distributed through Apple’s App Store, are subject to
24 personal jurisdiction in California based on their execution of IDPLA. The relevant authorities do
25 support such a broad theory of personal jurisdiction. *See, e.g., Attachmate Corp. v. Celcom*

26 ⁵ (IDPLA (Dkt. 134-6), ¶ 1.1 (“You accept and agree to the terms of this License Agreement
27 . . . by doing either of the following: (a) checking the box displayed at the end of this Agreement
28 if You are reading this on an Apple website; or (b) clicking an “Agree” or similar button, where
this option is provided by Apple.”).)

1 *Axiata Berhad*, No. 10-cv-0526-RSM, 2010 WL 4856793, at *2 (W.D. Wash. Nov. 22, 2010)
 2 (“[C]lick-through agreements’ [are] insufficient to establish the contacts necessary for the
 3 exercise of personal jurisdiction. The [agreements] themselves constitute contracts entered into
 4 by Defendant from afar, and without more, cannot satisfy minimum contacts.”); *see also Gray &*
 5 *Co. v. Firstenberg Mach. Co. Inc.*, 913 F.2d 758, 760 (9th Cir. 1990) (“A contract alone does not
 6 automatically establish the requisite minimum contacts necessary for the exercise of personal
 7 jurisdiction.”).

8 Notably, the Eastern District of Virginia recently rejected jurisdictional arguments very
 9 similar to those asserted by Plaintiffs in this case. In *Intercarrier Communications, LLC v. Kik*
 10 *Interactive, Inc.*, the court ruled that Kik lacked sufficient minimum contacts with Virginia to
 11 justify the exercise of either general or specific personal jurisdiction. No. 12-cv-00771-JAG,
 12 2013 WL 4061259, at *3–5 (E.D. Va. Aug. 9, 2013). In support of that conclusion, the court
 13 identified many of the same facts relevant to this motion: “Kik’s sole office is located in Ontario,
 14 Canada”; “Kik offers Kik Messenger free-of-charge”; “Kik has had no revenue from software
 15 sales as of March 2013”; “Kik primarily uses third-party app stores to distribute its software
 16 product”; “Kik does not ask users for their mailing addresses”; Kik’s App is available “generally
 17 and worldwide”; Kik’s App contains no “geo-location facilities”; and “Kik has not marketed Kik
 18 Messenger in Virginia.” *Id.* at *1. Although the court was not called upon to address Kik’s
 19 execution of the IDPLA with Apple in either Texas or California, the court’s factual findings and
 20 its conclusion that Kik is not subject to personal jurisdiction are otherwise on point in this case.

21 **2. Kik has not “purposely availed” itself of this forum.**

22 Plaintiffs also fail to make a prima facie showing that Kik has purposely availed itself of
 23 the benefits of conducting business in California in a manner sufficient to support the exercise of
 24 personal jurisdiction in this case. To do so, Plaintiffs would have to show that Kik
 25 “(1) committed an intentional act, which was (2) expressly aimed at the forum state, and
 26 (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be
 27 suffered in the forum state.” *Bancroft*, 223 F.3d at 1087. Foreseeable effects in the forum are not
 28

1 enough; there must be “something more”—*i.e.*, an “express aiming . . . targeted at a plaintiff
2 *whom the defendant knows to be a resident of the forum state.*” *Id.* (emphasis added).

3 The uncontested facts preclude Plaintiffs from meeting this standard. Neither of the
4 named plaintiffs who allegedly downloaded the App are residents of California. (CAC, ¶¶ 21,
5 22.) Nor is there is any allegation that Kik “even knew of the existence of the plaintiffs, let alone
6 targeted them individually.” *Bancroft*, 223 F.3d at 1088. In fact, because Kik does not require
7 users to provide their full name or location information, Kik would not know of any plaintiffs’
8 location even after they downloaded the App. (Heinke Decl., ¶ 16.) Plaintiffs also concede that
9 “none of these Plaintiffs travelled to or were in California’s Northern District when they bought
10 their iDevices or the defendants’ harmful add-on apps, *nor were they injured there.*” (Pltfs.’
11 Opp’n to Transfer at 9 (emphasis added).) Because Plaintiffs cannot show that they suffered
12 harm in California—let alone that Kik knew harm was “likely to be suffered in” California—
13 there is no support for a finding that Kik is subject to personal jurisdiction in California by virtue
14 of “purposely availing” itself of the benefits of the forum state.

15 The Eastern District of Virginia’s order granting Kik’s Rule 12(b)(2) motion in
16 *Intercarrier Communications* rejected the same “purposeful availment” arguments that Plaintiffs
17 assert in this case. Specifically, the court held that Kik Messenger’s worldwide availability via
18 Apple’s App Store did not constitute “deliberately targeting” the forum state: “A company does
19 not ‘consciously’ or ‘deliberately’ target a forum if a user unilaterally downloads and uses its
20 software within that forum.” 2013 WL 4061259, at *4. The court also rejected the idea that
21 promoting the App in ways that “obviously reach directly into Virginia” constitutes purposeful
22 availment. *Id.* Here, as in the *Intercarrier Communications* case, Plaintiffs’ jurisdictional
23 arguments are based on “flawed logic” that assumes purposeful availment “simply because a
24 product is popular and widely-used.” *Id.*

25 3. Plaintiffs’ claims do not “arise from” Kik’s forum-related activities.

26 Even if Kik’s execution of the IDPLA or the online availability of its App constituted
27 “purposeful availment” of the laws of California, Plaintiffs’ claims do not “arise from” those
28 contacts with California. First, the CAC is silent on this issue. Second, Kik anticipates that

1 Plaintiffs will resurrect their previous contention that, “but for” executing the IDPLA, Kik could
2 not have developed its App and therefore could not have committed the alleged wrongful acts.
3 (Pltfs.’ Opp’n, at 13.) This misconstrues the “arising from” test. Plaintiffs are not asserting a
4 claim for breach of the IDPLA; Plaintiffs allege that Kik surreptitiously harvested contact
5 information from users at the time they downloaded and installed the App. (CAC, ¶ 245.)
6 Plaintiffs’ claims therefore “arise from” the alleged functionalities of Kik Messenger, not from
7 Kik’s agreements with Apple. *See Avilis v. Kuckle*, 978 F.2d 201, 204–05 & n.4 (5th Cir. 1992)
8 (no specific jurisdiction arising from forum-based contract because “plaintiffs’ cause of action is
9 not based upon any contract . . . but upon the alleged violation of two federal statutes. . .”).

10 Further, as previously detailed, neither of the named plaintiffs who allegedly downloaded
11 the App resides in California nor alleges that they downloaded the App in California. Because
12 these named plaintiffs do not have a connection to California, their claims do not arise out of or
13 relate to Kik’s alleged contacts with California. *See, e.g., Matthews v. Brookstone Stores, Inc.*,
14 469 F. Supp. 2d 1056, 1067 n.17 (S.D. Ala. 2007) (finding lack of personal jurisdiction where
15 named plaintiff was not resident of forum state and did not purchase allegedly defective product
16 in forum state: “[A] plaintiff cannot rely on acts allegedly perpetrated against other putative class
17 members to establish personal jurisdiction over defendants for her claims.”).

18 Finally, even if one of the named plaintiffs *did* allege that he or she downloaded the App
19 in California, this still would not establish personal jurisdiction over Kik. A plaintiff’s unilateral
20 act—such as a California resident choosing to download an App—is insufficient to establish
21 specific personal jurisdiction. *See Helicopteros*, 466 U.S. at 416–17 (holding that “unilateral
22 activity of another party or a third person is not an appropriate consideration when determining
23 whether a defendant has sufficient contacts with a forum State”). That some users (other than
24 Plaintiffs) who downloaded the App may reside in California is the very definition of “random”
25 or “fortuitous” contact. Because Plaintiffs do not allege that Kik specifically targeted the named
26 Plaintiffs or any other individual in California, Kik’s alleged contacts with California do not
27 support the exercise of personal jurisdiction in this case.

28

1 **4. Exercising personal jurisdiction over Kik would offend traditional**
 2 **notions of fair play and substantial justice.**

3 Even if the Court concludes that Kik has minimum contacts with California sufficient to
 4 support the exercise of personal jurisdiction, doing so would offend traditional notions of fair play
 5 and substantial justice. This due process inquiry is a test of “reasonableness” based on the
 6 following factors: “(1) the extent of a defendant’s purposeful interjection; (2) the burden on the
 7 defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the
 8 defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient
 9 judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in
 10 convenient and effective relief; and (7) the existence of an alternative forum.” *Panavision Int’l,*
 11 *L.P. v. Toebben*, 141 F.3d 1316, 1323 (9th Cir. 1998). Applied here, these factors demonstrate
 12 that asserting personal jurisdiction over Kik in this case would not comport with due process.

13 At the outset, “[t]he fact that [Kik] is ‘unquestionably [a] resident [] of Canada . . . tends
 14 to undermine the reasonableness of personal jurisdiction.’” *Callaway Golf Corp. v. Royal*
 15 *Canadian Golf Ass’n*, 125 F. Supp. 2d 1194, 1206 (C.D. Cal. 2000) (quoting *Rocke v. Canadian*
 16 *Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981). Indeed, the extent of Kik’s alleged
 17 “purposeful interjection” in California is attenuated at best. Kik is party to an online agreement
 18 with a California corporation (Apple), but engages in no advertising directed at California and has
 19 no offices, properties, employees, or bank accounts in California. (Heinke Decl., ¶¶ 3, 6, 8, 11);
 20 *see also Callaway*, 125 F. Supp. 2d at 1206 (“The foreign-acts-with-forum-effects jurisdictional
 21 principle must be applied with caution, particularly in an international context.”) (quoting *Core-*
 22 *Vent Corp. v. Nobel Indus AB.*, 11 F.3d 1482, 1486 (9th Cir. 1993)).

23 Turning to the second factor, a substantial burden would be imposed on Kik if it were
 24 forced to defend the suit in this forum. Kik is a foreign entity with its headquarters, principal
 25 place of business, and sole office located in Ontario, Canada. “The unique burdens placed upon
 26 one who must defend oneself in a foreign legal system should have significant weight in assessing
 27 the reasonableness of stretching the long arm of personal jurisdiction over national borders.”
 28 *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 114 (1987). Indeed, the Ninth

1 Circuit has held that the burden on a Canadian company litigating in California would be
 2 “substantial.” *Rocke*, 660 F.2d at 399. Here too, the financial and logistical burdens of litigating
 3 in this forum will be substantial for Kik. *See Intercarrier Commc’ns*, 2013 WL 4061259, at *5
 4 (“Adjudication of this claim in Virginia would significantly burden Kik. All of Kik’s employees
 5 and officers are located in [Ontario] Canada.”); *see also id.* (noting that “Kik has limited
 6 resources to defend itself in a distant, and foreign, forum”); *see also Callaway*, 125 F. Supp. 2d
 7 at 1205–06 (noting that proportionally greater burden of litigating in California fell “on
 8 defendant, whose employee witnesses are located in Canada, including the [decision makers] who
 9 made the critical decision at issue in this litigation.”).

10 Because Kik is a Canadian company, there also is a significant conflict with the
 11 sovereignty of Kik’s home forum. “Where the defendant is a resident of a foreign nation rather
 12 than a resident of another state within our federal system, the sovereignty barrier is higher.”
 13 *Rocke*, 660 F.2d at 399 (internal quotation omitted); *see also Asahi*, 480 U.S. at 115 (“Great care
 14 and reserve should be exercised when extending our notions of personal jurisdiction into the
 15 international field.”) (internal quotations omitted).

16 The remaining factors also support the conclusion that exercising personal jurisdiction
 17 over Kik in this forum would be unreasonable. California has little to no interest in adjudicating a
 18 suit between a Canadian company and plaintiffs from Virginia and Arkansas. *See Intercarrier*
 19 *Commc’ns*, 2013 WL 4061259, at *6 (noting lack of evidence that forum-state “residents use [Kik
 20 Messenger] proportionately more than residents of any other state”). And although Plaintiffs
 21 have little interest in maintaining their claims against Kik in California (*see* Pltfs.’ Opp’n to
 22 Transfer (Dkt. No. 193) at 6–11), they do have an adequate alternate forum: Canada. The courts
 23 of Canada are fully capable of adjudicating Plaintiffs’ claims against Kik fairly and efficiently.⁶

24 Finally, the fact that Plaintiffs’ claims against Kik are procedurally consolidated with their
 25 claims against several other defendants in this district does not trump the constitutional mandate

26 _____
 27 ⁶ Canada has adopted a law entitled the Personal Information Protection and Electronic
 28 Documents Act, S.C. 2000, c.5 (Can.), and has created a governmental office, the Office of the
 Privacy Commissioner to enforce privacy laws and protect the public. *See*
http://www.priv.gc.ca/leg_c/index_e.asp.

1 of due process for non-resident defendants. In the case against Kik in the Eastern District of
 2 Virginia, multiple related suits by the same plaintiff were pending in that court; nonetheless, the
 3 court held that “[a] desire for efficiency, however, cannot supersede the basic requirement in any
 4 lawsuit, personal jurisdiction.” *Intercarrier Commc’ns*, 2013 WL 4061259, at *6. There, as here,
 5 the exercise of personal jurisdiction over Kik would be “inconsistent with due process.” *See id.*

6 **C. Kik Is Not Subject to Jurisdiction Under the Federal Long-Arm Statute.**

7 Plaintiffs do not cite Rule 4(k)(2) in the CAC—commonly referred to as the “federal long-
 8 arm statute”—but do assert that jurisdiction exists under “the nationwide reach of the RICO
 9 statutes.” (CAC ¶ 14.) To the extent that Plaintiffs’ reference to the “nationwide reach of the
 10 RICO statutes” is an implicit assertion of federal long-arm jurisdiction, Plaintiffs cannot meet their
 11 burden under Rule 4(k)(2).

12 First, Plaintiffs have expressly repudiated a necessary element of Rule 4(k)(2) jurisdiction:
 13 that the defendant is *not* subject to jurisdiction in any state court of general jurisdiction. *See*
 14 *Pebble Beach Co.*, 453 F.3d at 1159. Plaintiffs have asserted that Kik *is* subject to jurisdiction in
 15 at least two states’ courts of general jurisdiction: Texas (SAC ¶ 43) and California (CAC ¶ 14).

16 Second, and more importantly, exercising jurisdiction over Kik pursuant to Rule 4(k)(2)
 17 would not comport with due process. Kik has no bank accounts, pays no taxes, has no
 18 employees, and owns no property in the United States, and does not conduct any advertising
 19 specifically targeting United States consumers. (Heinke Decl., ¶¶ 6–11.) Although federal long-
 20 arm jurisdiction turns on *nationwide* contacts rather than *state-specific* contacts, exercising Rule
 21 4(k)(2) jurisdiction over Kik would be unreasonable for the same reasons discussed above (*see*
 22 section IV.B.4, *supra*). *See Pebble Beach Co.*, 453 F.3d at 1159 (“The due process analysis is
 23 identical to the one [under California’s long-arm statute], except here the relevant forum is the
 24 entire United States.”).

25 **D. Kik’s Jurisdictional Arguments Have Not Previously Been Addressed or**
 26 **Decided in this Action.**

27 In the CAC, Plaintiffs assert that the Western District of Texas determined “that all
 28 Defendants are subject to personal jurisdiction in the Northern District of California.” (CAC,

1 ¶ 14.) In fact, the order that Plaintiffs rely on neither addressed nor ruled on Kik’s then-pending
2 motion to dismiss for lack of personal jurisdiction. (*See* Dkt. No. 217 (“Transfer Order”).)

3 Kik’s Rule 12(b)(2) motion was fully briefed prior to transfer (*see* Dkt. Nos. 141, 203,
4 212), but the only reference to Kik’s motion in the Transfer Order was in a list of several then-
5 pending motions. (*See* Transfer Order at 2.) The Transfer Order expressly states that the court
6 decided only whether “transfer to the Northern District of California is proper under 28 U.S.C.
7 § 1404(a).” (*Id.* at 3.) The court granted the motions to transfer by certain app-developer
8 defendants⁷ and Apple (Dkt. Nos. 124, 147) based on its conclusion that “this matter could have
9 been brought in the Northern District of California.” (*Id.* at 6 (citing fact that “Apple is
10 headquartered there, and conducts the heart of its business from California”).) “[A]ll other
11 pending motions”—including Kik’s Rule 12(b)(2) motion—were “dismissed” (*i.e.*, denied)
12 without prejudice. (*Id.* at 8.)

13 Plaintiffs are simply wrong in asserting that the transferor court considered Kik’s
14 personal-jurisdiction arguments on the merits, much less determined that Kik is “subject to
15 personal jurisdiction in the Northern District of California.” (CAC, ¶14.) Plaintiffs may attempt
16 to rely on the court’s statement that “all [defendants] sold apps through the Apple app store,
17 which is the nexus of the allegations in this case.” (Transfer Order at 6) But this language was
18 part of the court’s discussion of transfer—*not* jurisdiction. Indeed, the court was not required to
19 address whether it had personal jurisdiction over Kik before ordering transfer. *See Kawamoto v.*
20 *CB Richard Ellis, Inc.*, 225 F. Supp. 2d 1209, 1211 (D. Haw. 2002) (“[T]his court need not decide
21 the issue of personal jurisdiction before deciding to transfer venue.”); *accord Panthera*, 2013 WL
22 1996318, at *6.

23
24
25 ⁷ The first page of the non-Apple defendants’ motion to transfer (Dkt. No. 124) states that “Kik
26 has separately filed a motion to dismiss for lack of personal jurisdiction. Kik joins this motion
27 *only* in the event that the Court denies its motion to dismiss for lack of personal jurisdiction”
28 (emphasis added). Because the court did not consider the merits of Kik’s motion, but instead
denied the motion without prejudice, the condition precedent to Kik’s joinder in the motion to
transfer did not occur.

1 Finally, this Court has already rejected arguments almost identical to those asserted by
2 Plaintiffs in this case. In *eMag Solutions, LLC v. Toda Kogyo Corporation*, No. 02-cv-1611-PJH,
3 2006 WL 3783548 (N.D. Cal. Dec. 21, 2006), the case was transferred from the Southern District
4 of Illinois to this district pursuant to § 1404(a). The Court rejected plaintiff’s contention that by
5 transferring under 1404(a), the Illinois court had necessarily made an implicit finding that this
6 Court had personal jurisdiction over the non-resident defendant:

7 [T]he Illinois district court’s order transferring the case to this district does not
8 constitute a finding that this court has personal jurisdiction over Titan, because
9 *the order did not address the individual defendants’ contacts with the United*
10 *States. The court simply found that “both venue and jurisdiction would be proper*
in the Northern District of California,” as “[s]everal of the defendants have
offices or headquarters in California, and the remaining defendants conduct a
substantial portion of their business in California.”

11 *Id.* at *1 (emphasis added). The language of the Transfer Order in this case is virtually identical
12 to the language quoted by the *eMag* court. Here too, the transferor court “did not address the
13 individual defendants’ contacts,” but simply noted that all the defendants sold apps through the
14 App Store. The court then found that “this matter could have been brought in the Northern
15 District of California,” but neither addressed nor decided the personal-jurisdiction arguments
16 raised in Kik’s Rule 12(b)(2) motion. (*See* Transfer Order at 6.) Plaintiffs’ contention that the
17 transferor court implicitly rejected Kik’s jurisdictional arguments is without merit.

18 **V. CONCLUSION**

19 For the reasons discussed above, Kik respectfully requests that the Court dismiss
20 Plaintiffs’ claims against it for lack of personal jurisdiction pursuant to Rule 12(b)(2).
21

22 Dated: September 10, 2013

COOLEY LLP

/s/ Mazda K. Antia

Mazda K. Antia

Attorneys for Defendant KIK INTERACTIVE, INC.